

UNITED STATES COURT OF APPEALS

MAR 16 1998

TENTH CIRCUIT

PATRICK FISHER
Clerk

KATHY MARTINEZ; MARLA FISHER; KATHERYN GURULE; MARSHA WENZEL; SONIA GANLEY; JOY GASS; GAYLE DEUTSCH, also known as Marcia Wolff; PATSY ALLGOOD; VANGIE FIGUEROA; ELIZABETH CVERNA; FRANK H. CVERNA; SHEREE STEVENS; MICHAEL C. CRAWFORD; ANNE GEORGE; CECILIA RIVERA; RHONDA CRAIG; WILLIAM J. CRAIG; SUSAN PRYOR; FRANK N. PRYOR; FLORENCE RODRIGUEZ; DONNY RODRIGUEZ; MARY SNIDER; ALBERT SNIDER; N. JOAN YORK; JUDY ARAGON; RITA DODSON; STEVE A. DODSON; SUE ANN GARCIA; WILLIAM W. GARCIA; GLORIA RAE; FLORENTINO RAE; DANETTE SHIRLEY; ROBERT R. SHIRLEY; REBECCA JONES; LORI HARTLEY; ROBERT THOMAS HARTLEY; CONNIE MATLOCK; DARLA BEACH; GAYE MOESSER; TAMMY J. KIRSCHMAN; SCHIRETE ZICK; DIANNE GARCIA; PHIL A. GARCIA; BARBARA ALLRED; EDGAR ALLRED; SHARON HAZELWOOD; MICHELLE T. JONES; HAROLD J. JONES; RUTH PORTER; RICHARD PORTER; EDITH SHAW; ALBERTA KUSNETZ; NORMAN KUSNETZ; DEBBIE DOMSON; CLAUDIA GATEWOOD; and ERIN ROSS,

Plaintiffs-Appellees,

v.

No. 97-2080
(CIV-96-8007-JC)
(D. New Mex.)

HEYER-SCHULTE, INC.; AMERICAN HOSPITAL
SUPPLY CORPORATION; BAXTER INTERNATIONAL
CORPORATION; BAXTER HEALTHCARE; GENERAL
ELECTRIC COMPANY; SURGITEK, INC.; BRISTOL-
MYERS SQUIBB COMPANY; NATURAL SURGICAL
SPECIALTIES; AESTHETECH CORPORATION;
COOPERSURGICAL, INC.; CUI CORPORATION;
FOAMEX, L.P.; FOAMEX PRODUCTS, INC.; KNOLL
INTERNATIONAL HOLDING, INC.; '21'
INTERNATIONAL HOLDINGS, INC.; MARKHAM
MEDICAL INTERNATIONAL, INC.; MEDICAL
ENGINEERING CORPORATION; SCOTFOAM
CORPORATION; COOPER COMPANIES, INC., formerly
known as Coopervision, Inc.; DOW CORNING
CORPORATION; DOW CORNING WRIGHT
CORPORATION; BIO-MANUFACTURING, INC.;
BIOPLASTY, INC.; HULS AMERICA,
INCORPORATED; INAMED CORPORATION;
MCGHAN MEDICAL CORPORATION; MCGHAN
NUSIL CORP.; MENTOR CORPORATION;
MINNESOTA MINING AND MANUFACTURING
CORPORATION; SIROD CORPORATION; UNION
CARBIDE CHEMICALS AND PLASTICS COMPANY,
INCORPORATED; UNION CARBIDE CORPORATION;
UROPLASTY, INCORPORATED; WILSHIRE
TECHNOLOGIES, INC.; MEC SUBSIDIARY
CORPORATION, formerly known as Surgitek, Inc.; 1211
FOAM COMPANY; 1211 INTERNATIONAL
HOLDINGS, INC.; NUSIL TECHNOLOGY, formerly
known as McGhan Nusil Corp.; DOW CHEMICAL
COMPANY, a foreign corporation; ST. JOSEPH
HEALTHCARE SYSTEM; RICHARD GOODING, Dr.;
and FRANK HERHAHN, Dr.,

Defendants,

A. GILL DYER and HILLARY THOMAS MURPHY,

Intervenors-Appellants.

ORDER AND JUDGMENT*

Before **ANDERSON, McKAY, and LUCERO**, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Intervenors-Appellants appeal the district court's dismissal with prejudice of their complaints and the court's award of costs to Plaintiffs-Appellees' counsel. Because the district court dismissed with prejudice the claims of a party, we exercise jurisdiction pursuant to 28 U.S.C. § 1291.

In its dismissal, the district court adopted the magistrate judge's Proposed Findings

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

and Recommendations filed February 10, 1997, without considering Intervenor's objections to those findings and recommendations. The court determined that Intervenor's objections were untimely filed. See Appellants' App. at 50-52 (Memorandum Opinion and Order, filed March 7, 1997). Intervenor contends that the district court erroneously calculated the time for filing objections to the magistrate judge's findings and recommendations, and, therefore, the court failed to conduct the requisite de novo review of those findings and recommendations and Intervenor's objections. Intervenor then asks this court to address the merits of their intervention claims. Plaintiffs agree that the district court miscalculated the time to file objections. However, Plaintiffs argue that the case should be remanded to the district court for de novo review of Intervenor's objections and Plaintiffs' responses to those objections.

After reviewing the record, we conclude that the district court erred in calculating the timeliness of Intervenor's objections to the magistrate judge's findings and recommendations under Federal Rule of Civil Procedure 6. Pursuant to 28 U.S.C. § 636(b)(1), we vacate the district court's Memorandum Opinion and Order and remand the case for the district court's de novo review of the timely filed objections to the magistrate judge's Proposed Findings and Recommendations. See Northington v. Marin, 102 F.3d 1564, 1570 (10th Cir. 1996); Summers v. Utah, 927 F.2d 1165, 1167-68 (10th Cir. 1991). In view of our ruling, upon remand the case will be in the same posture as it

was on the day on which Intervenor's objections were timely filed, February 28, 1997.¹

REVERSED and REMANDED.

Entered for the Court

Monroe G. McKay
Circuit Judge

¹ Our review of the applicable Federal Rules of Civil Procedure, the record, and the civil docket indicates that Intervenor A. Gill Dyer timely filed his objections to the magistrate judge's recommended disposition on February 28, 1997. Those objections were entered into the docket on March 3, 1997. We have determined that, under Federal Rules of Civil Procedure 5(b) and (6), Intervenor had until March 3, 1997, to timely file objections.